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No. 724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

AUCLAIR TRANSPORTATION, INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Massachusetts

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REPLY TO MOTIONS TO AFFIRM

KENNETH B. WILLIAMS
111 State Street
Boston 9, Massachusetts

PETER T. BEARDSLEY
RICHARD R. SIGMON
1616 P Street, N. W.
Washington 36, D. C.

Attorneys for Appellants

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Preliminary

Because we believe the questions involved in this proceeding are of paramount importance in the administration of the Interstate Commerce Act by the Commission, and to the transportation industry, appellants, pursuant to the provisions of Rule 16(3), file this reply to the motions to affirm filed jointly by the United States of America and the Interstate Commerce Commission, and separately by Railway Express Agency, Incorporated.

The Motions To Affirm Manifest A Substantial Confusion About The Basis For The Commission's Decision

Not unexpectedly, each of the appellees contend that this appeal presents no substantial question warranting plenary review by this Court. But the motions to affirm manifest a substantial and unresolvable confusion about the basis of the Commission's decision. Thus, the United States and the Commission (hereinafter the Government), in their joint brief, put forth two bases for the decision and completely fail to overcome the irreconcilable conflict between the two rationales.

At p. 6 of the joint brief, the Government states that the basis of the Commission's determination that the policy of Section 5(2)(b) and the National Transportation Policy did not require the imposition of the usual rail-affiliate restrictions was the conclusion "that such restrictions were not appropriate here because of the unique characteristics of express service."[1] And again at p. 10, the Government argues that "the unique characteris-

[1] In their footnote at this point, the Government refers to the Commission's discussion of the supposed historically different treatment of Railway Express, a discussion based in part at least on factual misunderstanding. For example, the footnote refers to the Commission noting that, in distinction from other rail-affiliated motor carriers, Railway Express's certificates "had never been restricted to serving points located on a railroad." This claim had not been made by any party before the Commission and was first stated in the Commission's decision. J.S. 67 It is curious that the Government still relies on this alleged fact when appellants' brief to the District Court referred to a number of Railway Express certificates in the Commission's public records which in fact do restrict the service only to rail points: e.g., Railway Express's certificates Sub-Nos. 12, 182 (not just rail points but stations of a named railroad), 251, 258, 374 (also to points of a named railroad), 435, 448 (also to points of a named railroad). And the Commission itself has noted that where, as with many of Railway Express's applications, all of the service points are rail stations, a rail-point restriction would be meaningless. *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457, 465, n. 4 (1956).

tics of express service" justified the Commission's conclusion that no "rail-haul" restriction need be imposed in the certificates awarded to Railway Express. On the other hand, the Government brief concedes, at pp. 11-12, that the restriction of rail-affiliated motor carrier certificates may not be relaxed unless "special circumstances" are shown to exist but claims that the Commission did in fact find special circumstances exist to justify the grant of certificates here without such restrictions. The Government's inability to determine the actual basis of the Commission's decision is shown by its wedding of the two inconsistent rationales in its second issue: "whether the district court erred in affirming the Commission's finding that special circumstances and the unique characteristics of REA's express service justify the lack of a rail-haul restriction in the certificates." pp. 8-9

The Government's second numbered argument, pp. 10-13, manifests a complete confusion of these two inconsistent rationales. It commences with the proposition that "the unique characteristics of express service establish that the Commission was acting within its discretion in concluding that no 'rail-haul' restriction need be imposed on the certificates awarded to REA." But its support of this contention is an acknowledgement that it is the railroad affiliation of the applicant rather than the nature of the service proposed which runs afoul of the anti-monopoly policy expressed in Section 5(2)(b). The Government correctly states that the policy "was intended to answer fears that the rail carriers, by subsidizing their affiliates' competition against motor common carriers, might destroy this competing mode of transportation." And it concedes that this policy has been interpreted to forbid certification of rail-affiliated motor carriers "for service other than that auxiliary to and supplemental of rail service except when 'special circumstances' justify the lifting of the restrictions."

The Government concludes this section of its brief with the statement that the Section 5(2)(b) policy and its "special circumstances" requirement are expressions of "the Commission's continuing duty to adjust the competing claims of rail carriers and motor carriers pursuant to the National Transportation Policy." pp. 12-13 But we submit that no such broad discretion as this suggests was intended by Congress. Rather than allowing for the interplay of competing railroad and motor carrier claims of relatively equal value, "Congress," as this Court said in *American Trucking Associations* v. *United States*, 364 U.S. 1, 6, "has expressed a strong general policy against railroad invasion of the motor carrier field." And, having re-enacted the provisions now in Section 5(2)(b) after some of the pertinent Commission decisions had been specifically called to its attention, Congress must be presumed to have approved the Commission's policy of restricting railroad affiliates to auxiliary and supplemental service. 364 U.S. 6-7. In view of this Congressional approval of the implementation of its policy, the Commission cannot now, without appropriate new legislation, retroactively change its position. This Court told the appellees in the *A.T.A.* case, 364 U.S. 15, that it was not the proper forum for changing this policy but that "the pardoning power in this case belongs to Congress." We submit that such a restriction lies no less heavily on the Commission.

The Government is in the position of straddling two horses charging in different directions. It defends the Commission's conclusion, J.S. 67, that it need not limit Railway Express, like other railroad affiliates, to operations auxiliary or supplemental of rail service because of its supposed unique status or, as expressed in the motion to affirm, "because of the unique characteristics of express service." p. 6 But the Government also recognizes that it is the railroad affiliation of the applicant rather

than the nature of the service which runs afoul of the legislative policy. Since the Government admits, p. 7, that the policy was designed to prevent railroads or their affiliates from engaging in all-out competition with independent motor carriers, it is difficult to understand how the Government can continue to argue that the Commission properly decided not to limit this railroad affiliate to service auxiliary to and supplemental of *rail* service because of the type of operations to be conducted.

Railway Express's interpretation of the Commission decision disagrees with that of the Government, since it contends that the Commission "specifically refused" to treat it differently from other rail-affiliated motor carriers, but based its decision solely on a finding of "special circumstances." pp. 5-6

The District Court's decision was not based on the unique status rationale but rather rested on the conclusion that the Commission "has in fact found the necessary special circumstances." J.S. 36 We submit that such basic and irreconcilable confusion about the basis of the Commission's decision, which unfortunately was not dispelled by the District Court's decision, requires clarification by this Court on review.

The Commission's Decision Was Not Based On A Finding Of Special Circumstances

While Railway Express contends that the sole basis of the Commission's decision was a finding of special circumstances, the Government's motion indicates doubt as to the actual basis for the conclusion not to attach the usual rail-oriented conditions. We submit, however, that the Government brief correctly states the basis of the Commission's decision, p. 6, when it says, "It concluded

that such restrictions were not appropriate here because of the unique characteristics of express service." [2]

Both the Government and Railway Express cite a statement of the Commission in its "summary or discussion," J.S. 83, as a finding of special circumstances in these proceedings. All of the appellees fail to recognize that the Commission there was not making findings in these specific cases, but was stating certain principles for future application in Railway Express cases. This is clear from the Commission's introductory sentence: "What we have said above has been mostly in an interpretive vein, and we think it necessary to attempt now to indicate generally with what force and in what manner these interpretations will effect the disposition of certain issues arising in REA applications." J.S. 82

Both motions to affirm quote only that portion of the paragraph containing the supposed finding of "special circumstances." When read in context of the complete paragraph, it is manifest that the supposed finding is no finding at all.

> When REA seeks to institute motor vehicle operations which are not auxiliary to or supplemental of those of the express company then, in order for it to succeed, it must show that special circumstances exist. For example, if REA should seek to render an irregular-route service, which service, as we have noted, has not been considered to be in the nature of an express service, it would appear that special circumstances would have to be shown in order for such application to be granted. Also, because the

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[2] We agree that the Commission's decision rested on this conclusion. But we point out that in *American Trucking Associations* v. *United States*, 364 U.S. 1, 14-15, this Court overturned a similar holding by the Commission and held that a conclusion that the auxiliary and supplemental restrictions are inappropriate because of the nature of the service is not an adequate basis for granting authority without those restrictions.

> express company is affiliated with the railroads within the meaning of section 5(2)(b), we believe that special circumstances must exist in order for REA to obtain a certificate authorizing motor vehicle operations wholly disassociated from rail operations. However, we are convinced that where the existing motor carriers are not rendering regularly an express service, special circumstances do, in fact, exist. J.S. 83

Certainly the first and second sentences are inappropriate to any specific finding in these proceedings, since Railway Express here seeks neither to perform operations not auxiliary to or supplemental of those of the express company, nor to render an irregular-route service. The conditional form for stating the three examples indicate that these are enunciations of general principles rather than specific findings. Only when it is recognized that, in its own words, the Commission was stating certain "guidelines" for "the course of events to come," J.S. 85, rather than making specific findings in the instant proceedings, does this entire paragraph—indeed, the entire section headed "summary or discussion"—make any sense.

When read in context, it is clear that the District Court erred in concluding, J.S. 36, that the Commission had made a finding of special circumstances in the instant proceedings that would justify the grant of motor carrier certificates without the usual rail-oriented restrictions.

Railway Express Misconstrues The Purpose of Section 5(2)(b)

In its argument in support of the contention that the Commission found the existence of "special circumstances," Railway Express misconstrues the purpose and intent of Section 5(2)(b). This is perhaps most clearly shown in the statement, p. 5, that in the light of the history and purpose of the section, "it would appear that

stock ownership by some 60 railroads is far different from the type of control Congress had in mind when it enacted that section."

The purpose of Section 5(2)(b), as this Court recognized in the *Rock Island* case (*United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 432 (1951)), is to prevent railroads from invading the field of trucking where their resources might be used to quickly destroy independent motor carrier competition. Where the affiliate of one railroad admittedly would have the power to rapidly eliminate competition in its area of operations unless restrained, a nationwide motor carrier affiliated with all of the country's major railroads and able to draw upon all of their resources, would have unlimited power to destroy independent motor carrier competition anywhere in the country or throughout the country. The difference occasioned by multi-railroad affiliation is one of degree rather than one of quality as implied by Railway Express. If the motor-carrier affiliate of an individual railroad must be restrained to protect independent competition, *a fortiori* the motor carrier affiliate of all the major railroads collectively must be so restrained.

In the face of a line of decisions by this Court to the contrary, Railway Express contends that motor carrier operations of rail affiliates need not be limited to those usable to public advantage in the rail service, p. 6, and surprisingly quotes from this Court's opinion in *American Trucking Associations* v. *United States*, 355 U.S. 141, 151-152 (1957), including the statement, "[W]e do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplemental limitations in a § 207 proceeding." This is a particularly inapposite citation by appellee since what is involved here is no occasional departure from the auxiliary and supplemental limitations. Rather, this decision by the Commission

represents a wholesale creation of unfettered nationwide railroad motor-affiliate authority to perform general freight service, because the independent motor carriers traditionally have not been given the commodity authority needed to perform a complete express service.

Railway Express would probably have recognized the inappropriateness for its purposes of the quoted material from the *A.T.A.* case had it read the entire page where the quotation began. 355 U.S. 151 The Court there placed the "special circumstances" test in proper perspective by quoting its own earlier conclusion that "[r]ail affiliates have been permitted to leave the line of the railroad to serve communities without other transportation service," and by quoting the Commission's statement of the test:

> In other words, a railroad applicant for authority to operate as a common carrier by motor vehicle, though required to do no more than prove, as any other applicant, that its service is required by public convenience and necessity, has a special burden . . . by reason of the very circumstance that it is a railroad. Where it fails to show special circumstances negativing any disadvantage to the public from this fact, a grant of authority to supply motor service other than service auxiliary to and supplemental of train service is not justified. *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457, 475

Permitting a rail affiliate occasionally to depart from the line of the railroad to serve communities without other transportation service is far different from granting nationwide general commodity motor carrier authority unrestricted to auxiliary and supplemental service merely because the rail affiliate applicant is an express company or because the independent motor carriers have not been authorized to transport the full range of general commodities.

Railway Express also suggests that the grant of authority to transport general commodities moving in ex-

press service and the reservation of the right to add future conditions are somehow relevant to the implementation of the Section 5(2)(b) policy. p. 9 It is not the nature of the service, but whether the motor operations are functionally tied to rail service, which determines whether the policy is being carried out. In *American Trucking Ass'ns, Inc.* v. *United States*, 364 U.S. 1 (1960), this Court held that the fact that the type of service (contract carriage) was incompatible with the auxiliary and supplemental restriction did not mean that the policy must be ignored, but rather that the application could not be granted. In the same case, this Court held that a "future conditions" limitation does not satisfy the policy, saying that such a restriction "obviously is no restriction at all on present operations, and hence can hardly be said to limit the trucking to an auxiliary or supplemental service." 364 U.S. 12

The Appellees Misstate Our Argument Regarding Express Service

Railway Express states, p. 12, that the argument regarding the definition of express service is nothing more than an argument that the Commission's finding is not supported by substantial evidence. The Government says, p. 9, that appellants "concede that REA offers a unique service which is different from ordinary motor carrier operations and which those carriers are unwilling to supply." Both of the motions to affirm fail to come to grips with the real issue: the Commission specifically refused to apply its own definition of "express service" so as to determine whether there is a need for such service which the existing motor carriers are failing to fill. Additionally, the Government statement is a complete distortion of appellants' argument and is based, in part at least, on a misreading of the District Court opinion. The Government reads the District Court as referring to independent motor carrier performance of "the service to be ren-

dered by REA," whereas the District Court's actual reference was to the performance of "express service." J.S. 32

And this is the crux of the problem: the Commission assumes that the proposed service is express service merely because Railway Express proposes to perform it. The Government says, p. 9, that Railway Express "offers the special handling needed for the shipment of perishables," in the face of a finding by the Commission, J.S. 85, that much of the traffic involved is not "traffic which inherently requires special handling of the type excluded from the authorities of, or not otherwise normally handled by, the protestants," and in spite of the Commission's rejection of the argument that the burden is on Railway Express to show that the proposed service will include "a significant number of commodities requiring, by nature, special handling." J.S. 84 We agree with the Government: "Such care is a dominant characteristic of express service." p. 10 Unfortunately, the Commission found that such care is not necessary for much of the traffic, and specifically concluded, in any event, that it would not measure the proposed service against such a "special handling" test.

The only other evidence suggested by the Government that express service is proposed is, p. 9, that "it is a service for small parcel traffic." But the proposed grants are in no way restricted to the handling of "small parcels," even if that were accepted as an adequate test of express service.

Both motions to affirm quarrel with appellants' argument that the rates for the service are evidence of whether true express service is being offered. In fact, the Government argues, p. 10, n. 8, that whether premium rates are being charged is "irrelevant" to this case, even while quoting, p. 5, the Commission's conclusion that ex-

press service "is a service superior to that rendered as a rule by common carriers of general freight, and thus requires the payment of premium charges."

The Government Misunderstands The Effect Of This Decision On The Scope Of Outstanding Railway Express Certificates

Appellants pointed out, J.S. 12, that the Commission's decision not to apply its long-standing interpretation of the "rail-haul" restriction to Railway Express certificates so restricted will greatly enlarge those outstanding certificates. The Government says, pp. 13-14, that such fears are unfounded but shows that it does not understand the basis of such fears. The Government assumes that they arise from past actions by Railway Express in ignoring the restriction, whereas appellants' fears are based on the Commission's conclusion to interpret the "rail-haul" restriction differently for Railway Express than for other railroad affiliates.

Even though Railway Express insists, p. 5, that the Commission treated it no differently from other railroad affiliates, in response to this argument it apparently had to hide behind the unique status given to it in this decision. Railway Express ignores the long-standing interpretation given to the "rail-haul" restriction in the certificates of other railroad affiliates, and argues about the absence of an interpretation of that restriction in a Railway Express case. The Commission's long-standing construction of the "rail-haul" restriction as requiring an *immediately* prior or subsequent movement over steel rails was reinterpreted in this decision as only prohibiting "a wholly motor movement." J.S. 72 This constitutes a substantial enlargement of numerous outstanding Railway Express certificates containing such a restriction, contrary to the provisions of the Interstate Commerce Act.

In its motion to affirm, Railway Express cites the Court's conclusion in *Arrow Transportation Company* v. *Southern Railway Co.*, 372 U.S. 658, 673, that it is for the Commission rather than the Courts to achieve a balance between the competing forms of transportation. We submit that the Court, in the sentence following the one cited by Railway Express, was distinguishing the *Arrow* situation from that which is involved in the instant case: "It is reasonable to suppose that had Congress felt that balance to be in danger of distortion, it would have addressed itself to our problem directly by enhancing the powers granted the Commission to enforce the [national transportation] policy." Here, Congress did feel that balance to be in danger of distortion and explicated its guidance to the Commission in Section 5(2)(b). The question for the Court is whether the Commission has heeded the Congressional mandate and properly utilized the powers given to it to maintain the necessary balance between the competing transportation modes.

The basic problem with which the Commission's decision here confronts the independent motor carrier industry is: it stretches a standard based on the unwillingness of such carriers, even though properly certificated, to provide a needed service, to encompass a completely dissimilar situation, i.e., one in which the independent motor carriers do not possess the requisite commodity authority to perform an express service.

In the first instance, represented by the *Rock Island* case, the Commission held that the independent motor carriers, although possessing the necessary authority, had not furnished the required service "except where it suited their convenience."[3] Having failed to perform their common-carrier obligation, the independent carriers were, in

[3] 63 M.C.C. 91, 102, quoted, *American Trucking Associations* v. *United States*, 355 U.S. 141, 170-71, n. 10.

effect, told by this Court that they were in no position to complain because the Commission allowed another carrier, albeit a rail affiliate, to fill the gap.

If the independent carrier interests were here attempting to prevent the rail affiliate involved from performing a *bona fide* express service, the *Rock Island* case would afford a parallel and serve as precedent. But what the independent carriers seek here is simply to prevent Railway Express from invading, on a wholesale basis, the field of general freight transportation which they occupy, and which, generally speaking, they are serving adequately. That wholesale invasion will be accomplished, however, if the Commission is allowed to equate, as it has here, the inability of the average motor carrier to render a true *express* service, because such authority has neither been traditionally sought nor granted, with an unwillingness on the part of motor carriers generally to provide an adequate *freight* service.

Respectfully submitted,

KENNETH B. WILLIAMS
111 State Street
Boston 9, Massachusetts

PETER T. BEARDSLEY
RICHARD R. SIGMON
1616 P Street, N. W.
Washington 36, D. C.

Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Richard R. Sigmon, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the eleventh day of March, 1964, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing copies, in duly-addressed envelopes, with postage prepaid, to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington, D. C., 20530, and to William H. Orrick, Jr., Assistant Attorney General, and to attorneys Lionel Kestenbaum, and Michael I. Miller, Department of Justice, Washington, D. C., 20530, and to W. Arthur Garrity, Jr., Esq., United States Attorney, 1107 U. S. Post Office & Courthouse Building, Boston 9, Massachusetts.

2. On the Interstate Commerce Commission, by mailing copies in duly-addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and H. Neil Garson, Esq., Associate General Counsel, at the Offices of the Commission, Washington, D. C., 20423.

3. On Railway Express Agency, Inc., intervening defendant, by mailing copies, in duly-addressed envelopes, with postage prepaid, to William J. Taylor and William H. Marx, Esqs., 219 East 42d Street, New York 17, New York, and to J. Joseph Maloney, Jr., Esq., 31 Milk Street, Boston 9, Massachusetts.

RICHARD R. SIGMON